REGISTERED No. D. 221

The Gazette of India

EXTRAORDINARY

PART II—Section 3

PUBLISHED BY AUTHORITY

No. 602] NEW DELHI, TUESDAY, DECEMBER 24, 1957/PAUSA 3, 1879

ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 18th December 1957

S.R.O. 4085.—Whereas the election of Maharani Vijay Raje Shinde, as a member of the House of the People from the Guna Constituency, has been called in question by an election petition presented under Part VI of the Representation of the People Act, 1951 (43 of 1951), by Shri Motilal, son of Jugal Kishore, Ward No. 12, Guna, Madhya Pradesh;

And whereas the Election Tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act for the trial of the said petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its order in the said election petition;

Now, therefore, in pursuance of the provisions of section 106 of the said Act the Election Commission hereby publishes the said order of the Tribunal.

BEFORE THE MEMBER, ELECTION TRIBUNAL, INDORE, M.P.

ELECTION PETITION No. 310/57

CORAM

Shri J. K. Narayan, Member, Election Tribunal.

Motilal s/o Jugal Kishore, Ward No. 12, Guna, (M.P.)—*Petitioner.*

Versus

Her Highness Maharani Vijaya Raje Shinde w/o His Highness Maharaja Jiwaji Rao Shinde, Usha Palace, Laskhar, Gwalior—*Respondent.*

Counsel for the Petitioner—Shri G. W. Oak.

Counsel for the Respondent—Shri K. A. Chitale.

JUDGEMENT

The petitioner was an elector, his number being No. 463 for the Guna Parliamentary Constituency and for the Guna Assembly Constituency Guna Town and he had presented this application for declaring void the election of the Respondent to Lok Sabha from the Guna Constituency. There were 10 candidates in all for this Parliamentary seat and out of them 7 candidates withdrew their candidatures and regarding withdrawal by them there is no dispute. The remaining three candidates were (i) Shri Brij Narain, (ii) Shri V. G. Deshpande who is described as the General Secretary of the All India Hindu Maha Sabha and (iii) the respondent who is described as Maharani Vijaya Raje Shinde wife of His Highness Jiwaji Rao Shinde, Gwalior. Shri Brijnarain had also sent a notice of withdrawal through one Shri Ramswaroop Verma and the Returning Officer after

accepting this notice excluded the name of the said Shri Brijnarain from the list of contesting candidates. The only contesting candidates after this withdrawal were the respondent and Mr. Deshpande The respondent was however successful at the election and secured a large number of votes, the result having been declared on 14th March, 957 and by this petition the petitioner challenged the result of the election on various grounds out of which I am now concerned with only one The only question is that there was no withdrawal by Shri Brijnarain according to law and that as there was no withdrawal by him in the eye of law, the Returning Officer should not have excluded him from the list of contesting candidates and because of this illegal exclusion the result of the election has been materially affected.

The respondent however has submitted a written statement and has contended that the election is not liable to be challenged on a mere technical ground. It is said that Shri Brijnarain having decided to avoid a contest with the respondent preferred to stand from the Shivpuri Constituency from which constituency he has been elected to the Parliament. The withdrawal notice is said to be a notice which was presented by a duly authorised person and properly accepted by the Returning Officer.

As many as 21 issues were framed in this case but the contest having now been reduced to only one point I am concerned only with the following issues:

1. Have all the material facts been set out by the Petitioner to warrant an enquiry into his allegation that the withdrawal of Shri Brijnarain was unauthorised?

2. Are Shri Brijnarain &/or Shri V. G. Deshpande —and consequently the petitioner, estopped, by their conduct from challenging the validity of the withdrawal of Shri Brijnarain?

3. (a) Whether the withdrawal of Shri Brijnarain mentioned as a candidate No. 3 in the paragraph 5 of the petition was not in accordance with the provisions of Sec. 37(1) and rule 9 of the Representation of People Act and therefore invalid, and as such whether it has materially affected the results of the election.

(b) If not, was the withdrawal of Shri Brijnarain unauthorised?

4. Did the withdrawal of Shri Brijnarain materially affect the election of the respondent and is her election liable to be called in question on that ground?

Issues Nos. 1, 3 & 4—The relevant provision for the withdrawal of candidature is to be found in Sec. 37 of the Representation of the People Act and according to Sub-section 1 of this section the withdrawal notice has to be delivered before 3 o'clock in the afternoon on the day fixed under clause (c) of section 30 to the Returning Officer either by such candidate in person or by his proposer or election agent who has been authorised in this behalf in writing by such candidate. And according to Sub-section 3 of section 37 the Returning Officer on receiving a notice of withdrawal has to cause a notice of withdrawal to be affixed in some conspicuous place in his office There is no dispute as to the presentation of the withdrawal notice and the withdrawal notice has been marked as Ex. 'A'. It is in form 5 which is the form prescribed under rule 9(1) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956. Rule 9(1) is in these terms: "A notice of withdrawal of candidature under Sub-section (1) of section 37 shall be in form 5 and shall contain the particulars set out therein; and on receipt of such notice, the Returning Officer shall note thereon the date on which and the hour at which it was delivered."

That this notice was subscribed by the candidate Shri Brijnarain is not in question; it was delivered to the Returning Officer at his office at 2-50 P.M. on 3rd February 1957 and its presentation was perfectly in time as would appear from the perusal of Sec. 37(1) read with Sec. 30(c) of the Act. But it was delivered to the Returning Officer by one Shri Ramswaroop Verma who has been described by the Returning Officer as the candidate's agent. Form 5 which is the form prescribed under rule 9(1) contains an important note and according to this note when the notice is delivered the Returning Officer has to insert one of the following alternatives as may be appropriate:

(1) Candidate.

(2) Candidate's proposer who has been authorised in writing by the candidate to deliver it.

(3) Candidate's election agent who has been authorised in writing by the candidate to deliver it.

The alternatives are only three and there cannot be a fourth one. If the person presenting was not the candidate or the candidate's proposer he must be the candidate's election agent, and obviously when the Returning Officer received this notice he did not even care to read the directions which are given in the form itself and therefore the person presenting was described by him as the candidate's agent. Probably if he would have read the directions even at the time when the notice was presented to him if not earlier he might have been able to avoid the mistake the consequences of which may be disastrous. As the fact stands, however, he received the notice presented by Shri Ramswaroop Verma who was not the election agent of Shri Brijnarain and on receipt of this notice he cancelled the name of Shri Brijnarain from the list of candidates. Sub-Sec. 3 of Sec. 37 lays down that the Returning Officer, shall on receiving a notice of withdrawal under Sub-Section (1), as soon as may be thereafter, cause a notice of the withdrawal to be affixed in some conspicuous place in his office. And Sub-Rule 2 of rule 9 lays down that the notice under Sub-Sec. (3) of section 37 shall be in form 6. The notice of the withdrawal of candidature was published in this case and it is Ex. 'B'. Shri Brijnarain's name alongwith the names of other candidates who had withdrawn is to be found in this notice. Section 38 is the next important section and it is in these terms.

"(1) Immediately after the expiry of the period within which candidatures may be withdrawn under Sub-section (1) of section 37, the Returning Officer shall prepare and publish in such form and manner as may be prescribed a list of contesting candidates, that is to say candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidature within the said period.

(2) The said list shall contain the names in alphabetical order and the addresses of the contesting candidates as given in the nomination papers together with such other particulars as may be prescribed."

The list of contesting candidates as published by the Returning Officer is Ex. 'C' and both Exs. 'B' and 'C' are dated 4th February, 1957. According to the rules the list of contesting candidates has to be published after the notice of the withdrawal regarding the withdrawn candidate has been affixed in some conspicuous place in the office of the Returning Officer. The Returning Officer was examined as a witness on behalf of the petitioner in this case and on reading his entire evidence I am not able to make sure if he had really affixed the notice of withdrawal in compliance with Sub-sec. 3 of section 37 before the publication of the list of contesting candidates. Though he has answered in the affirmative the important question put to him by the counsel for the Respondent and has even stated that before the publication of the notice in form 6 he had in his mind he withdrawal of the candidature and the refund of the deposit to Ramswaroop Verma, he had to admit that he was not sure whether the actual publication of form 7A which is the list of the contesting candidates was made before or after the publication of the form containing the list of the withdrawn candidates. When pressed further he no doubt stated that the two notices might have been published simultaneously. If he is not sure whether the publication of form 7A was made before or after the publication of the form containing the list of withdrawn candidates what he adds subsequently cannot inspire much confidence. In fact even apart from his statement that the two notices might have been published simultaneously, which is an indefinite statement and hence a statement not to be acted upon, the law never contemplates that the two notices should be published simultaneously. I have quoted section 38 *in extenso*, so that it may be appreciated that the publication of the list of contesting candidates has to be done only after the expiry of the period within which candidatures may be withdrawn under Sub-section 1 of Sec. 27. The withdrawal notice had been presented to the Returning Officer on 3rd February, 1957 and the period within which candidatures could be withdrawn expired after 3 P.M. on 4th February 1957. There is nothing to show that Ex 'C' was published after the publication of Ex.'B' or after 3 P.M. on 4th February 1957 and if the Returning Officer is himself not sure as to which of the two publications was made first and if both the publications are dated 4th February 1957 there cannot be a definite finding by a Court of justice that the list of the contesting candidates was really published after the publication of the notice Ex. 'B' and it is a very serious matter that the Returning Officer is himself not certain if the actual publication of form 6 was made before the publication of the form containing the list of withdrawn

candidates. How the Returning Officer has reacted to the questions put or the suggestions made by the counsel for the respondent would appear from the following question and answer:—

"Q: When you have said in your examination in chief that Ramswaroop had not been appointed the election agent by Brijnarain you meant that he was not appointed in the prescribed form.

Ans: Yes."

The Returning Officer had distinctly stated in his examination in chief that Mr. Brijnarain had not appointed any election agent and that it was true that Ramswaroop Verma (the agent who had delivered to him the withdrawal notice) was neither a proposer nor an election agent of Mr. Brijnarain. But still his answer to the above question or suggestion of learned counsel was in the affirmative. The learned counsel who is certainly a lawyer of great eminence considered it necessary to suggest some such thing to the Returning Officer, but the Returning Officer before he said 'Yes' should have considered what he had said in his examination in chief and what the law was of which he must have become aware after the filing of this election petition if not earlier. With the greatest respect for the counsel for the respondent who had to advocate the cause and present a case on behalf of his client, there is no such distinction as he wanted to draw in his suggestion put to Mr. Ranade the Returning Officer. The whole question is whether Ramswaroop was an election agent or not and there is no warrant for the proposition that he would be deemed to be an election agent within the meaning of the expression as it has been used in Sec. 37 even if he had not been appointed in the prescribed form. The affirmative answer which Mr. Ranade gave was therefore not expected of him.

I would now deal with the question of law as it arises in this case with a view to judging how far the withdrawal could be deemed to be legal so as to exclude the name of Shri Brijnarain from the list of contesting candidates. The expression 'election agent' though not defined in the Act has been given a particular meaning and it would be wrong to assume that any agent can be deemed to be an election agent. Sec. 40 lays down that "a candidate at an election may appoint in the prescribed manner any one person other than himself to be his election agent and when any such appointment is made, notice of the appointment shall be given in the prescribed manner to the Returning Officer." The Section as it stood before had made it compulsory for the candidate to appoint an election agent and under the old section the candidate could appoint himself as his election agent. The relevant rule in this connection is rule 12 which lays down that "any appoinament of an election agent under Sec. 40 shall be made in form 8 and the notice of such appointment shall be given by forwarding the same to the Returning Officer." The old section 40 had a sub-Sec. 2 which was in these terms: "When a candidate appoints some person other than himself to be his election agent he shall obtain in writing the acceptance by such person of the office of such election agent."

In the amended Act this sub-Sec. has been deleted but form 8 contains two declarations one by the candidate making the appointment and the other by the election agent accepting the appointment. And Sec. 41 as it stood before has been fully retained in the amended act. According to this section no person can be appointed an election agent who is disqualified from being an election agent under Sec. 145. This is stringent provision and completely rules out the possibility of any ordinary agent being described as an election agent. Sec. 145 lays down that "any person who is for the time being disqualified for being a member of either House of Parliament or the House or either House of the Legislature of a State or for voting at elections, shall, so long as the disqualifications subsists, also be disqualified for being an election agent at any election." If the statute has disqualified certain persons from acting as an election agent and in this respect has put a candidate and his election agent in the same category then the appointment of an election agent is an important and a serious matter, there being no scope for taking the view that even an ordinary agent can be deemed to be an election agent. Thus the distinction which the learned counsel tried to make cannot be made and an election agent is only one who does not suffer from any of the disqualifications contemplated by the Act and who is appointed in the prescribed form and according to the prescribed rules. The learned counsel did not try to make any point out of the substitution of the word 'may', for the word 'shall' in the previous section but he referred to the circumstance that before he sent his withdrawal notice Mr. Brijnarain had no

election agent whatsoever. But neither the work 'may' nor the want of an election agent prior to the date of the notice of withdrawal has any consequence. Under Sec. 37 the withdrawal notice could be presented either by the candidate or by his proposer or by his election agent and if Mr. Brijnarain had no election agent when he sent his withdrawal notice he could have either the withdrawal notice himself or could have sent it through his proposer. If therefore the notice had not been sent through an election agent or through the proposer and in the alternative had not been presented by the candidate himself the law had not been complied with, it being another point as to whether the provision of Sec. 37 are to be deemed as directory or mandatory. Casually the learned counsel for the respondent referred to the new Sec. 55(a) which provides for retirement from contest. But I do not think I should discuss a point not raised before me with any seriousness. Even the 'agent' contemplated by Sec. 55(A)(2) must have an authority in writing and the relevant rule in this connection is rule 16 which lays down that the notice of retirement besides being affixed to the board has also to be published in the official gazette. And there is a particular form (form 12) prescribed for the notice contemplated by Sec. 55(A). The learned counsel of course was fair enough not to contend before me that if the notice with which I am dealing is not a valid notice under Sec. 37 it should be deemed to be a notice under Sec. 55(A), and the question of the applicability or otherwise of Sec. 55(A) does not at all arise in the circumstances of this case.

Thus the facts established in this case are:—

(1) A notice of withdrawal contemplated by Sec. 37 was sent to the Returning Officer.

(2) The notice was not delivered to the Returning Officer by any of the three person specified in the Section that is, neither by the candidate himself nor by his proposer nor by his Election Agent.

(3) This notice was never cancelled but it cannot be deemed to be a notice delivered to the Returning Officer according to the spirit or the letter of the law as embodied in Sec. 37.

(4) In view of the evidence of the Returning Officer we cannot be sure in this case that the list of the nominated candidates was published after the directions given in Sec. 37(3) had been carried out.

On these facts, I have to determine the vexed question of law which arises whenever a statutory provision has been disregarded, either deliberately or inadvertantly, that is, the question as to what should be the consequence of non-compliance under the particular set of circumstances proved or admitted. So far as an election context is concerned it is now very well settled that it is not be regarded as an action at law or suit in equity but purely as a statutory proceeding unknown to the common law. The Supreme Court in the well known case of Jagan Nath Vs. Jaswant Singh (AIR 1954 S.C.P. 210) observed that the general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. Their Lordships' observation to the effect" "that the statutory requirements of the election law must be strictly observed" are important for my purpose, and if election contest is purely a creature of the statute concerning which neither common law powers nor the rules of equity can be invoked, then it is essential to observe and carry out quite strictly the provision of the statute and the rules made thereunder. Because I have referred to this decision of the Supreme Court which was not and could not be cited by the counsel for the respondent as an authority in his favour I must point out that the ratio *decidendi* of this case is something different. Their Lordships held that non-compliance with the provisions of Sec. 82 was not fatal to an election petition and that the matter had to be determined in accordance with the rules of the Code of Civil Procedure which had been made expressly applicable. As observed in this case there was no valid reason for considering the word 'Shall' in Sec. 82 in a manner different from the same word used in order 34 Rule 1, Civil P.C. The actual decision arrived in this case is therefore not relevant for our present purpose. After having given my most anxious consideration to the provisions of Sec. 37 I do not find any escape from the conclusion that this is one of those provisions the aim and object of inserting which in the Act would be defeated if the command to do the thing in the particular manner prescribed did not imply the prohibition to do it in any other manner. The withdrawal of the candidature is a contingency contemplated by

the Act and it is therefore provided for in the Act. So far as an election contest is concerned it is a very important matter if a candidate seeks to withdraw and the question of withdrawal is important and a matter of grave concern not only to the candidates contesting the election but to the entire electorate. I will have occasion to refer to the recent decision of the Supreme Court in Surendranath Khosla Vs. S. Dalip Singh (AIR 1957 S.C.P. 242), but for the present it is only necessary for me to refer to the following observation made in the Judgement of this case,—

"Apart from the practical difficulty, almost the impossibility, of demonstarting that the electors would have cast their votes in a particular way, that is to say, that a substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of several candidates for an election had been kept out of the arena is by itself a very material consideration. Cases can easily be imagined where the most desirable candidate from the point of view of electors and the most formidable candidate from the point of view of the other candidates, may have been wrongly kept out from seeking election. By keeping out such a desirable candidate, the officer rejecting the nomination paper may have prevented the electors from voting for the best candidate available."

It is therefore that the legislature in its wisdom has laid down a particular rule of procedure for withdrawal of a candidature. Sub-Sec. (1) of Sec. 37 consists of two parts and to my mind it would be a fallacious reasoning to suggest that while the first part is essential the 2nd part is not. If a withdrawal notice cannot be deemed to be a proper and a legal notice in case it fails to comply with the first part it cannot also be deemed to be effective if there is failure to comply with the 2nd part. Even the word 'Subscribed' comes in the 2nd part and after the word 'and'. The notice in order to be effective has to be drawn up in a particular form and has to be delivered in a particular manner. No other form can be substituted for the form prescribed and no other method of delivery can be substituted for the method prescribed. Both the ingredients must be complied with before the withdrawal can be effective. In Maxwell's interpretation of statutes we find the following note:—

"When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the question often arises: What intention is to be attributed by inference to the legislature? Where, indeed the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention."

I think the proposition is in-controvertible that if the command to serve the notice in the manner indicated in sub-Sec. (1) of Sec. 37 which does imply the prohibition to serve it in any other manner is not carried out the aim and object of the legislature behind enacting this provision would be clearly defeated. The following notes in Maxwell's book also appear to me to be important:—

> "The position is the same where compliance is made, in terms, a condition precedent to the validity or legality of what is done, as when, for example, the deed of a married woman was to take effect "when" the certificate of her acknowledgement of it was filed (g), or where in bankruptcy it was provided that no appeal should be entertained "unless" certain rules were complied with (h). The neglect of the statutory requisites in such cases would obviously be fatal."
>
> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment (l). It may, perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by consideration of convenience and justice (m), and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under

consideration must be regarded (n). The general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially (o)."

> "Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature."

The manner of withdrawal as provided in the Act is a formality enjoined by the Act and the rigorous observance or which is essential for making the withdrawal effective, and if the formality is not complied with there is no withdrawal in the eye of law with the result that the candidate is still to be regarded as a validly nominated candidate and the electors are entitled to exercise their franchise by voting in his favour. The following quotation from Maxwell also appears to me to be quite relevant:

> "Where it was enacted that a person who objected to a voter's qualification might be heard in support of his objection if he had given notice to the voter and it was provided that besides the ordinary way of serving it, the notice might be sent by post addressed to his place of abode, 'as described' in the list of voters prepared by the clerk of the peace, it was held that to send by post a notice, not to the address so given, which was incorrect, but to the true address, was not a compliance with the Act, and therefore that the objector could not be heard on mere proof of posting the notice (y)."

Even if the provision of Sec. 37 is regarded as a provision only for regulating the procedure there is no reason to assume that it is to be regarded as merely directory and not imperative. As pointed out by the Supreme Court in Durga Shankar Mehta Vs. Ragnuraj Singh (AIR 1954 S.C.P. 520) there is no material difference between non-compliance and non-observance or breach.

In Jamuna Prasad Mukhariya Vs. Lachhi Ram (AIR 1954 S.C.P. 686). Their Lordships made the observations though in a some what different context, that the right to stand as an candidate and contest an election is not a common law right, but a special right created by the statute which can only be exercised on the conditions laid down by the Statute. If the withdrawal by Mr. Brijnarain was not according to law his name should have been mentioned in the list of nominated candidates and it was not open to the Returning Officer not to keep a box for him at the Polling Stations. In support of my view that compliance with one part of Sec. 37(1) is not sufficient, I may cite the observation of the Supreme Court in Hari Vishnu Kamath Vs. Ahmed Ishaque (AIR 1955 S.C.P. 233) that there can be no degrees of compliance. Undoubtedly the true intention of the legislature is the determining factor and that ultimately depends on the context. Visount Maugham in the well-known case of Punjab Co-operative Bank (AIR 1940 Privy Council P. 230) also quoted the observation in Maxwell that an absolute enactment must be obeyed or fulfilled exactly, but that it is sufficient if a directory enactment be obeyed or fulfilled substantially. There is no reason for treating the provision of Sec. 37 as included within the latter category. The provisions of Sec. 37 and 38 are as imperative as the other connected provisions such as Sections 35, 36, 38 and 39 and they come within the perview of the well-known rule of law that where power is given to do a certain thing in a certain way the thing must be done in that way or not at all. The effect of this particular statute is clearly to prescribe the mode in which election is to be conducted and it is not open to any body to substitute another mode. Sec. 37 like the other sections quoted above are included within the mode or the method prescribed. As was pointed out in the majority judgement of the Supreme Court in Aswini Kumar Ghosh Vs. Arabindo Bose (AIR 1952 S.C.P. 369). "it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the Statute." Their Lordships of the Supreme Court while discussing the Representation of the People Act, observed in N. P. Ponnuswami Vs. the Returning Officer, Namakkal (AIR 1952 S.C.P. 64) that "the act is a self-contained enactment so far as elections are concerned,

which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder."

In Rattan Anmol Singh Vs. Ch. Atma Ram (AIR 1954 S. C.P. 510). Their Lordships had to construe the meanings of the word "subscribed" in Section 33 (1) of the Act and it was held in this case that when the law enjoins the observance of a particular formality it cannot be disregarded and the substance of the thing must be there. In my opinion this authority directly helps the contention of the petitioner's counsel before me though it was not cited by him.

Though I was not asked to follow in this case the decision of the Supreme Court in Pratapsingh Vs. Shri Krishna Gupta (AIR 1956 S.C.P. 140) I think I ought to refer to it specially in view of the general observation which is made in this case. I need not cite the decisions which have laid down that "every judgement must be read as applicable to the particular facts proved or presumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are had been found." A glance at the facts of this case will show that the objection that had been raised was purely a technical one. There were several candidates at the election and only one had struck out the 'caste' in the printd form and had written "occupation" as the new rule required and Their Lordships had to refer to a particular Section which was in these terms.—

> "Anything done or any proceeding taken under this Act shall not be questioned ..... on account of any defect or irregularity not affecting the merits of the case." This decision can therefore by no means regarded as a decision helpful to the respondent. Though not cited by the counsel for the respondent I have come across the decision of an Election Tribunal reported in IV E.L.R. P. 466 in which I find that an objection had been taken to the effect that the form did not show who had presented the withdrawal notice, and rightly perhaps (I say with respect) the Judges of the Tribunal pointed out with reference to rule 9(1) that the Returning Officer had only to note the date on which and the hour at which the notice had been delivered. On the other hand the decision in III E.L.R.P. 125 which deals with Sec. 37 and which the question as to how a withdrawal notice has to be presented is a decision helpful to the contention raised by the petitioner before me. The way in which the delivery of the withdrawal notice has to be made was stressed in this case and the Judges held that if the attempted withdrawal was not a withdrawal according to law it was ineffective.

Lastly I am to consider the fact that Mr. Brij Narain a candidate on whose behalf the withdrawal notice had been sent has already been elected to Parliament from the Shivpuri Constituency. The learned counsel for the respondent urged before me that the petitioner who was a mere voter could not challange the election of the respondent in as much as Mr. Brij Narain has already been elected from another constituency, and the election of this constituency cannot therefore be deemed to have been materially affected. But the law gives equal rights to a candidate and to an elector for the purpose of calling an election is question and the observations of the Supreme Court in Surendra Nath Khosla Vs. S. Dalip Singh already cited by me afford a clear answer to the contention of the respondent's learned counsel. Besides the observation quoted above the following observation is also important:—

> "On the other hand, in the case of the improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field. The conjucture therefore is permissible that the legislature realising the difference between the two classes of cases has given legislative sanction to the views by amending S. 100 by the Representation of the People (Second Amendment) Act, 27 of 1956, and by going to the length of providing that an improper rejection of any nomination paper is conclusive proof of the election being void." It is not a matter which concerns only Mr. Brij Narain and the respondent or the other candidates It

is a matter which concerns the entire electorate of the constituency and if Mr. Brij Narain had been wrongly kept out from this constituency any of the electors had a right to have the election of the respondent set aside, no matter if Mr. Brij Narain has been elected from another constituency. The clear position in this case is that because Mr. Brij Narain had been wrongly kept out his nomination though valid cannot be deemed to have been given effect to by the Returning Officer and therefore it is a case where the nomination has been improperly discarded. Under Section 100 the election of the returned candidate has to be declared as void if a nomination has been improperly rejected and because the nomination of Mr. Brij Narain was not taken into consideration at all, when the list of nominated candidates was published this is virtually a case of an improper rejection of a nomination paper and consequently the petitioner has the right to have the election declared void. The decision of the Supreme Court (in A.I.R. 1957 S.C.P. 242) was given in a case which arose under the old Act in which there was no distinction drawn between the improper acceptance or the improper rejection of any nomination. Under the amended Act improper rejection has been put on a different footing from improper acceptance."

[illegible] would therefore decide all these issues in favour of the petitioner.

Issue No. 2 - This issue was not pressed. There can not be any estoppal against [illegible] statute and I have already said that the petitioner's right to question the election is the same as that of Mr. Brij Narain or the losing candidate Mr. Deshpande.

The question of the withdrawal of the deposit money by Ramswaroop Verma [illegible] behalf of Mr. Brij Narain is of no consequence and this point was not even argued before me. I will however refer to my recent decision in Election Petition No. 51/57 ([illegible] v. Dr. [illegible] Katju) in support of my view that the [illegible] of the deposit is a matter of no consequence. I shall quote only following observations from my judgment in the case referred to above:—

"Section [illegible] says merely [illegible] that a candidate shall not be deemed [illegible] duly nominated candidate unless he makes the deposit re[illegible] and Section [illegible] lays down *inter alia* that if the nomination [illegible] candidate [illegible] has made the required deposit is rejected, the [illegible] shall be returned to him or to his heir if he dies before the [illegible] of the polls. According to this section the deposit [illegible] the very next moment after the rejection and if the [illegible] allows a refund in the event of rejection it was perfectly open to the petitioner to apply for the refund atonce after the rejection of his nomination paper and to obtain an order for it irrespective of the question as to whether he intended or did not intend to file an election petition challenging the return of the successful candidate. It was the statutory right of the petitioner to obtain the refund of the money deposited by him after his nomination paper had been rejected, whether rightly or wrongly, and it was also his statutory right to file an election petition challenging the result if he came within the meaning of the definition of the word "candidate" as given in Part VI, irrespective of all other consideration."

"Section 34 which deals with deposits is to be found in part V and section 159 to which reference has been made by the counsel for the respondent and which is the provision for the return of deposits is in part X which is styled as miscellaneous. According to the definition of "Candidate" as given in Part VI even a person who claims to have been duly nominated as a candidate at an election is to be regarded as a candidate for the purpose of filing an election petition, and he will be deemed to have been a candidate, from the time he began to hold himself out as a prospective candidate."

And I [illegible] already said that the right of an elector to question an election [illegible] that of a candidate.

In the result this application is allowed and the election of the respondent is declared void. The respondent will pay Rs 100 as costs to the petitioner. This amount of costs is regarded as sufficient in view of the fact that the petitioner has made no attempt to prove the several alegations of corrupt practices as made in the petition.

(Sd.) J. K. NARAYAN,

Member, Election Tribunal, Indore (Madhya Pradesh).

Dated the 30th Nov. 1957.

Dictated and corrected by me

(Sd.) J. K. NARAYAN,

Member, Election Tribunal, Indore (Madhya Pradesh).

[No 82/310/57/7393.]

By Order,

A. KRISHNASWAMY AIYANGAR, Secy